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PRODUCTS LIABILITY— APPLICABILITY OF COMPARATIVE NEGLIGENCE

DAVID A. FISCHER*

I. INTRODUCTION

Products liability and comparative negligence are two very rapidly developing fields of tort law. In recent years, the vast majority of courts have adopted strict liability for harm caused by defective products. At the same time, the doctrine of comparative negligence has changed almost overnight from a doctrine that had been accepted by only a handful of jurisdictions into what is now the majority approach in this country.¹

Neither doctrine is as yet fully developed, especially with respect to the way each is to interrelate with other rules of law. Further developments must be carefully considered because they will have a dramatic effect on the impact of these two legal doctrines. This is especially true in jurisdictions which adopt the current trend to apply comparative negligence to strict liability cases. The focus of this article is to deal with the ways in which the two doctrines interrelate.

A. Policy Considerations

The philosophy underlying comparative negligence is that a plaintiff who has been partially at fault in producing a harm to himself should not recover his full damages from a defendant who also has been partially at fault in producing that harm. Rather, equity requires that the plaintiff's recovery be diminished in proportion to the relation between his own fault and the defendant's fault.² It is frequently asserted that this is what juries have commonly done anyway, in disregard of the judge's instructions.³

In addition to being more equitable than the all or nothing rule of contributory negligence,⁴ comparative negligence has the added virtue of

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1. Brewster, *Comparative Negligence in Strict Liability Cases*, 42 J. AIR L. & COM. 107 (1976).

2. V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 2.1 (1974).

3. V. SCHWARTZ, *supra* note 2, § 1.2(B) at n.57; Brewster, *supra* note 1, at 113; Levine, *Buyer's Conduct as Affecting the Extent of Manufacturer's Liability in Warranty*, 52 MINN. L. REV. 627, 656-57 (1968); Noel, *Defective Products: Abnormal Use, Contributory Negligence, and Assumption of Risk*, 25 VAND. L. REV. 93, 118 (1972); Prosser, *Contributory Negligence as Defense to Violation of Statute*, 32 MINN. L. REV. 105, 127 (1948).

4. Brewster, *supra* note 1, at 113.

promoting respect for the law. The approach permits the jury to decide cases in accordance with the court's instructions rather than on subjective emotion in disregard of a clear rule of law.⁵

Products liability rules represent an attempt to resolve the tension among several conflicting social policies. Imposition of liability permits losses resulting to a few individuals to be spread among all consumers; the manufacturer will have to raise the price of his product enough to pay for the losses or to purchase insurance against those losses.⁶ Potential liability also provides an incentive to produce safer products because risk spreading increases costs, and competition forces the manufacturer to keep his costs down.⁷ Balanced against these considerations is the need to avoid imposition of liability so onerous that it will impair the functioning of useful business enterprises. Imposition of liability on automobile manufacturers for all harm resulting from the use of their automobiles is consistent with the goals of risk-spreading and providing an incentive to producing a safer product. However, because of the enormity of harm caused by automobiles, such liability would have disastrous consequences to the automobile industry. This would in turn have a serious impact on the rest of our economy. Subsequent to the industrial revolution, and until recently, the balance between these competing policies has been drawn by requiring the injured party to establish fault (negligence or intentional misconduct) before the loss would be shifted to the manufacturer. The law of strict liability has eliminated the need to prove fault, at least in many situations, but has substituted other limitations which operate to prevent the manufacturer from being held liable as an insurer.

At common law, contributory negligence was an absolute defense to negligence actions. The justification for the defense is that it provides an incentive to the plaintiff to use reasonable care for his own welfare,⁸ and it provides an arbitrary protection for infant industry.⁹ Simple contributory negligence in failing to discover a risk is not a defense to a strict products liability action because industry no longer needs this arbitrary defense,¹⁰ and courts have come to dislike the all or nothing nature of the defense.

There is an emerging trend, advocated by many legal writers, to apply comparative negligence to strict liability actions.¹¹ Several federal

5. V. SCHWARTZ, *supra* note 2, § 21.1 at 338; Levine, *supra* note 3, at 656-57.

6. Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 82-84, 87-88 (1973); Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 826 (1973).

7. See generally Holford, *supra* note 6; Wade, *supra* note 6.

8. V. SCHWARTZ, *supra* note 2, § 21.1 at 336; Fleming, *The Supreme Court of California, 1974-1975—Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239, 243 (1976).

9. Fleming, *supra* note 8, at 242; Levine, *supra* note 3, at 658.

10. SCHWARTZ, *supra* note 2, § 21.2 at 339-40.

11. Brewster, *supra* note 1, at 114; Feinberg, *The Applicability of a Comparative Negligence Defense in a Strict Products Liability Suit Based on Section 402A of the Re-*

courts, in diversity cases, have predicted that the state whose law was being applied would adopt this approach.¹² Several state courts have applied the comparative negligence concept to strict liability cases in one form or another.¹³ From a policy perspective, this is very desirable because the policies of risk-spreading and providing the plaintiff with an incentive to act carefully can be simultaneously advanced¹⁴ in such a way as to achieve a more equitable distribution of the loss.¹⁵ This is because the policy in favor of compensating the victim is impaired only to the extent that he was at fault in not protecting himself.¹⁶ The entire loss is spread among all consumers except for that portion of the loss that is attributable to the victim's misconduct. It is difficult to justify shifting this portion of loss to society as a whole.

*B. Problems Arising from Application of
 Comparative Negligence to Strict Liability*

Application of comparative negligence to strict liability does present one serious difficulty. This is the lack of a basis of comparison. In the typical comparative negligence case the jury is asked to compare the fault of the two negligent parties. This determination is wholly subjec-

statement of Torts 2D (Can Oil and Water Mix?), 42 INS. COUNSEL J. 39 (1975); Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, 5 ST. MARY'S L.J. 655, 674 (1974); Fleming, *supra* note 8, at 270; Freedman, *The Comparative Negligence Doctrine Under Strict Liability: Defendant's Conduct Becomes Another "Proximate Cause" of Injury, Damage or Loss*, 1975 INS. L.J. 468; Levine, *supra* note 3, at 637, 652; McNichols, *The Kirkland v. General Motors Manufacturers' Products Liability Doctrine—What's in a Name?*, 27 OKLA. L. REV. 347, 407 (1974); Noel, *supra* note 3, at 118; Phillips, *The Standard for Determining Defectiveness in Products Liability*, 46 CIN. L. REV. 101, 108 (1977); Schwartz, *Strict Liability and Comparative Negligence*, 42 TENN. L. REV. 171, 178 (1974); Vetri, *Products Liability: The Developing Framework for Analysis*, 54 OR. L. REV. 293, 314 n.99 (1975); Wade, Crawford & Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423, 452-53, 460 (1974).

12. *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276 (5th Cir. 1975); *Rodrigues v. Ripley Indus., Inc.*, 507 F.2d 782 (1st Cir. 1974); *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976); *Hagenbuch v. Snap-On Tools Corp.*, 339 F. Supp. 676 (D.N.H. 1972); *Chapman v. Brown*, 198 F. Supp. 78 (D. Hawaii 1961). *See also* *Pan Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977) (admiralty law).

13. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 144 Cal. Rptr. 380, 575 P.2d 1162 (1978); *West v. Caterpillar Tractor Co.*, 336 So. 2d 80 (Fla. 1976); *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377 (Minn. 1977); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977); *Powers v. Hunt-Wesson Foods, Inc.*, 64 Wis. 2d 532, 219 N.W.2d 393 (1974); *Schuh v. Fox River Tractor Co.*, 63 Wis. 2d 728, 218 N.W.2d 279 (1974); *Netzel v. State Sand & Gravel Co.*, 51 Wis. 2d 1, 186N.W.2d 258 (1971); *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

15. *Feinberg, supra* note 11, at 44; *Schwartz, supra* note 11, at 179.

16. *Noel, supra* note 3, at 117.

tive, but it is a rational determination.¹⁷ For example, it is clear that one who intentionally runs a stoplight is more culpable than one who runs the light because his attention is distracted. This is very similar to the kind of subjective determination that the jury is required to make in negligence cases. In such cases, the jury must decide not only what the party did or failed to do, but it also must evaluate that conduct and determine whether it was reasonable or unreasonable.¹⁸ In a comparative negligence case, the jury goes further and determines how unreasonable it is.¹⁹ The difficulty is that in many strict liability cases the defendant is not at fault. In such cases there is no negligence to compare with plaintiff's negligence.

In cases where the defendant is not negligent, a plaintiff who is even slightly contributorily negligent will be completely barred from recovery.²⁰ This is because under comparative negligence the jury is required to take the combined negligence of both parties as being 100 percent and attribute an appropriate percentage to each party. If the defendant's fault is zero, it follows that the plaintiff's fault will automatically be 100 percent, no matter how slight that fault is. The result is that simple contributory negligence becomes an absolute defense to strict liability actions in such cases.

Furthermore, this result is one that is likely to happen with some frequency because the vast majority of comparative negligence jurisdictions have adopted some form of modified comparative negligence.²¹ Under this system, contributory negligence is an absolute bar if the plaintiff has been either equally negligent or more negligent than the defendant, depending on the form of modified comparative negligence. Because the defendant's liability is based upon principles of risk distribution rather than personal culpability, there are likely to be a great many cases where the jury would find that the defendant is less at fault than the plaintiff.²² Thus, simple contributory negligence in the failure to discover the danger will often become a complete defense in many products liability cases.

Application of the doctrine in this manner is unacceptable. The vast majority of courts have determined that simple contributory negligence

17. Aiken, *Proportioning Comparative Negligence—Problems of Theory and Special Verdict Formulation*, 53 MARQ. L. REV. 293, 294-95 (1970).

18. Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453, 454 (1933).

19. See text accompanying notes 41-48 *infra* for a listing of the factors considered in making the comparative negligence determination. They are essentially the same as the factors used in determining whether a party is negligent in the first place.

20. Payne, *Reduction of Damages for Contributory Negligence*, 18 MOD. L. REV. 344, 344-45 (1955).

21. See Part II *infra*.

22. V. SCHWARTZ, *supra* note 2, §§ 12.6, 12.7. See Part II *infra*.

in failing to discover a risk should not be an absolute defense in strict liability actions.

An alternative to finding for the defendant in such cases is for the jury to ignore the court's instructions and to award damages to the plaintiff according to its own subjective sense of justice.

Ironically the two major justifications for comparative negligence (harshness of the all or nothing rule of contributory negligence and undesirability of permitting jury to disregard a rule of law) both arise as arguments against comparative negligence in strict liability cases if damages are to be apportioned on the basis of comparative culpability. Certainly the all or nothing rule of contributory negligence is more objectionable in strict liability cases than in negligence cases because as a matter of policy most courts have determined that it should not be an absolute defense in strict liability cases. Common law courts did not reach this decision in negligence cases. Furthermore, if "a system which succeeds only by utter disregard of its basic rules is clearly unsatisfactory"²³ in negligence cases, then it should be equally unsatisfactory in strict liability cases.

The reaction of scholars and courts to these problems has been mixed. Some have rejected the application of comparative negligence to strict liability because of the problem of no appropriate basis of comparison,²⁴ because the comparative negligence statute involved did not apply to strict liability cases,²⁵ or because contributory negligence is not a defense to strict liability.²⁶ Others have accepted the applicability of comparative negligence to strict liability.²⁷ They have attempted to overcome the problem of a lack of an appropriate basis of comparison in one of two ways. The first is to redefine the term "fault" so as to include the defendant's innocent conduct, and then have the jury compare the defendant's fictitious "fault" with the plaintiff's actual fault. The second method is to have the jury compare causation rather than fault. Both of these approaches are discussed in depth in Part III *infra*. For reasons discussed there, it will be seen that these approaches are an unsatisfac-

23. Levine, *supra* note 3, at 657.

24. *Buccery v. General Motors Corp.*, 60 Cal. App. 3d 533, 132 Cal. Rptr. 605 (1976); *Kinard v. Coats Co.*, 553 P.2d 835 (Colo. App. 1976); Kalven, *Comments on Maki v. Freik—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 897, 904 (1968); Levine, *Strict Products Liability and Comparative Negligence: The Collision of Fault and No-Fault*, 14 SAN DIEGO L. REV. 337, 356 (1977); Note, *Products Liability, Comparative Negligence, and the Allocation of Damages Among Multiple Defendants*, 50 S. CALIF. L. REV. 73, 102 (1976).

25. *Brown v. Link Belt Corp.*, 565 F.2d 1107 (9th Cir. 1977); *Melia v. Ford Motor Co.*, 534 F.2d 795 (8th Cir. 1976); *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974).

26. *Kirkland v. General Motors Corp.*, 521 P.2d 1353 (Okla. 1974).

27. See Part III *infra*.

tory solution to the problem. There is a satisfactory way to apply comparative negligence to strict liability cases. This method is discussed in Part IV *infra*.

Once the decision to apply comparative negligence to strict liability is made, a further problem arises. The extent to which comparative negligence is to be applied to assumption of the risk and misuse must be determined. These questions will be discussed in the next issue of the Missouri Law Review.

II. COMPARATIVE NEGLIGENCE

A. Method of Reducing Damages

Comparative negligence works in the following way. The degree of the plaintiff's culpability (negligence) is compared to the degree of the defendant's culpability (negligence). The combined culpability (negligence) of the two parties is deemed to equal 100 percent, and the amount of the plaintiff's recovery is reduced in proportion to the amount of negligence attributable to him.²⁸ Thus, if the plaintiff's damages are \$10,000 and he is 30 percent at fault while the defendant is 70 percent at fault, he will be able to recover 70 percent of his damages or \$7,000. Likewise, if the plaintiff is 40 percent at fault and the defendant is 60 percent at fault, the plaintiff will be able to recover 60 percent of his damages or \$6,000.

B. Pure Comparative Negligence

Under a system of pure comparative negligence, the plaintiff can recover even though his fault is greater than that of the defendant.²⁹ Thus a plaintiff who is 90 percent at fault may recover 10 percent of his damages. If he is 99 percent at fault, he may recover 1 percent of his damages. Six states have adopted pure comparative negligence, three by statute³⁰ and three by judicial decision.³¹

C. Modified Comparative Negligence

Modified comparative negligence is a system that permits the plaintiff's fault to diminish his recovery rather than constitute an absolute defense only if that fault does not exceed a specified percentage of negligence.³² Once this level is exceeded, contributory negligence reenters as an absolute defense.

28. V. SCHWARTZ, *supra* note 2, § 3.2.

29. *Id.*

30. *Id.* § 1.4.

31. Kaatz v. State, 540 P.2d 1037 (Alaska 1975); Li v. Yellow Cab Co., 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

32. V. SCHWARTZ, *supra* note 2, § 3.5(A).

Twelve states have adopted a form of modified comparative negligence which permits the plaintiff a proportionally reduced recovery as long as his negligence was less than the defendant's negligence.³³ This is sometimes referred to as the 49 percent system, because at the point of his being 49 percent negligent, the plaintiff may recover 51 percent of his damages. However, if his negligence is equal to or greater than the defendant's, he may recover nothing. Because of the difficulty of precisely determining the exact percentages of fault, juries frequently return verdicts finding the parties equally at fault.³⁴ This tendency produces a hardship under the 49 percent system because under such circumstances the plaintiff is completely barred.

In order to avoid this hardship, seven states have enacted the 50 percent type of modified comparative negligence.³⁵ Under this system, the plaintiff can recover a proportionally reduced amount of damages if his negligence is equal to or less than the defendant's negligence.³⁶ If the jury finds the parties to be equally at fault, the plaintiff recovers one-half of his damages.

The "slight/gross" system of modified comparative negligence has been adopted in two states.³⁷ This system does not employ fixed percentage limits. The plaintiff's award is proportionally reduced only if his negligence is slight and the defendant's negligence is gross in comparison.³⁸ Otherwise, contributory negligence remains a complete bar.

D. Multiple Defendants

The existence of multiple defendants creates problems of administration under modified comparative negligence. If the plaintiff is 40 percent at fault and each of three defendants is 20 percent at fault, there is a question whether the plaintiff is barred because his negligence is greater than the negligence of any given defendant. In some jurisdictions he is not barred as long as he is eligible to recover under the statute if his negligence is compared to the combined negligence of the multiple defendants. In other jurisdictions, the plaintiff would recover nothing in this situation because his negligence is compared to the negligence of each individual defendant to determine whether he could recover from that particular defendant. In such jurisdictions, if the plaintiff's negligence is 40 percent, defendant A's negligence is 50 percent, and defendant B's negligence is 10 percent, the plaintiff can recover from defendant A but not from defendant B.

33. Feinberg, *supra* note 11, at 44.

34. V. SCHWARTZ, *supra* note 2, § 3.5(B).

35. *Id.*

36. *Id.*

37. *Id.* § 3.4(B).

38. *Id.*

E. *Basis of Comparison*

Comparative negligence does not change the common law doctrine that negligence is not actionable unless it is a cause of the harm. Therefore, only the negligence of the parties which caused the harm may be considered under comparative negligence.³⁹

Once causation is established, the comparison is between the culpability of the plaintiff and that of the defendant rather than the causal contribution made by the plaintiff and the defendant.⁴⁰ The following factors are considered in comparing the fault of the parties:

1. The magnitude of the harm threatened by the conduct;⁴¹ the more dangerous the conduct, the more culpable the party is likely to be.⁴²
2. The extent to which the harm was foreseeable.⁴³ In this regard inadvertent conduct is less culpable than the deliberate creation of a risk of harm.⁴⁴ The diminished capacity of the party⁴⁵ or the presence of an emergency⁴⁶ are also factors which lessen culpability.
3. Balanced against the foregoing factors is the value of the interest the party was protecting by his conduct.⁴⁷ Less culpability is involved in taking an unreasonable risk to achieve a worthy objective than to achieve an unworthy one. However, this factor must be considered in light of the alternative means available to the party to protect his interests.⁴⁸

In addition to considering the relative fault of the parties, a few jurisdictions also purport to compare the causal contribution of the fault in producing the harm.⁴⁹ This is normally done in a very loose fashion⁵⁰ without any attempt to define how much weight is to be given each factor or in what manner causal potency or directness is to be determined.⁵¹ Causal contribution is an unsatisfactory basis of comparison for several reasons. This is discussed in depth in Part III *infra*.

39. *Id.* § 4.1.

40. *Id.* § 17.1; Fleming, *supra* note 8, at 249; Prosser, *Comparative Negligence*,

51 MICH. L. REV. 465, 481 (1953); Note, *supra* note 24, at 79.

41. V. SCHWARTZ, *supra* note 2, § 17.1.

42. Wade, Crawford & Ryder, *supra* note 11, at 451.

43. V. SCHWARTZ, *supra* note 2, § 17.1.

44. Wing v. Morse, 300 A.2d 491, 500 (Me. 1973); Wade, Crawford & Ryder, *supra* note 11, at 451.

45. Wade, Crawford & Ryder, *supra* note 11, at 451.

46. Wing v. Morse, 300 A.2d 491, 500 (Me. 1973); Wade, Crawford & Ryder, *supra* note 11, at 451.

47. V. SCHWARTZ, *supra* note 2, § 17.1.

48. *Id.*

49. Wing v. Morse, 300 A.2d 491 (Me. 1973); Kohler v. Dumke, 13 Wis. 2d 211, 108 N.W.2d 581 (1961).

50. Prosser, *supra* note 40, at 481.

51. Kohler v. Dumke, 13 Wis. 2d 211, 108 N.W.2d 581 (1961).

III. CASES APPLYING COMPARATIVE NEGLIGENCE TO STRICT PRODUCTS LIABILITY

A. Negligence Per Se Theory

In *Dippel v. Sciano*⁵² Wisconsin became the first jurisdiction to apply its comparative negligence statute to strict liability cases. The court adopted section 402A of the *Restatement (Second) of Torts*.⁵³ In dictum it indicated that contributory negligence is a defense and that the Wisconsin modified comparative negligence statute applies.⁵⁴

The court reached this result by reasoning that the strict liability imposed by the *Restatement* is analogous to negligence per se. If the section had been enacted by statute, the court would have considered a violation to be negligence per se and would have applied modified comparative negligence. The court reasoned that because it could have done this by adopting a statutory standard of care (had there been one), it could achieve the same result by announcing a standard of care as a matter of law.

The court countered the argument that liability under the *Restatement* is not negligence because foreseeability is not required by pointing out that under negligence per se the defendant is also foreclosed on the question of foreseeability. Some legal writers have agreed with this analogy,⁵⁵ sometimes arguing that this form of strict liability is indistinguishable from cases which apply the negligence per se theory to violations of "pure food" statutes and at the same time refuse to recognize any excuses for violation.⁵⁶

A comparison of common law negligence with negligence per se illustrates that the negligence per se analogy to section 402A is inappropriate. The function of the jury in a common law negligence case is twofold. It must decide the facts and it also must decide the ethical question of whether the defendant acted reasonably.⁵⁷ The latter function requires the jury to establish a specific standard of conduct, *i.e.*, what specific precaution a reasonable person would have taken in order to protect the plaintiff.⁵⁸ The only guidance the law provides in such cases is to establish the general standard of conduct,⁵⁹ *i.e.*, a reasonable

52. 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

53. RESTATEMENT (SECOND) OF TORTS § 402A (1965) [hereinafter cited as RESTATEMENT].

54. 37 Wis. 2d 443, 461, 155 N.W.2d 55, 63 (1967).

55. Feinberg, *supra* note 11, at 41-42; Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 14 (1965); Wade, *supra* note 6, at 850.

56. Wade, *supra* note 55, at 14; Wade, *supra* note 6, at 835.

57. Morris, *supra* note 18, at 454.

58. RESTATEMENT, *supra* note 53, § 285, comment g.

59. *Id.* comment d; Morris, *supra* note 18, at 454.

man standard. Under this guidance, the jury determines the specific standard of conduct required,⁶⁰ e.g., in a collision case, that the defendant should have signaled his intention to turn.

In negligence per se cases the court determines that a legislatively established specific standard of conduct shall constitute the standard of conduct of a reasonable person.⁶¹ For example, a statute might require a driver to signal his intention to turn 200 feet prior to turning. The role of the jury is merely to determine the facts, i.e., whether the statute was violated.⁶² The jury is not permitted to determine that some precaution other than the one provided in the statute was reasonable. Negligence per se is a determination that the only reasonable precaution is the one provided in the statute.

Because negligence per se addresses itself to the specific standard of conduct rather than a general standard of conduct, the only type of statute that is appropriate is a safety statute that prescribes a particular precaution⁶³ for the protection of the plaintiff from the type of harm that he suffered.⁶⁴

Negligence per se is not strict liability. It is true that the jury is not permitted to determine that some precaution other than the one prescribed in the statute is reasonable because that issue has been determined as a matter of law. This does not mean that a defendant who fails to comply with the statute has used reasonable care. He is normally at fault for not taking the required precaution. However, if he has an adequate reason for not taking the required precaution, e.g., existence of an emergency or reasonable ignorance of occasion for compliance,⁶⁵ he is not at fault.⁶⁶ The violation is excused, and he is not negligent.⁶⁷ A defendant who unreasonably fails to comply with a statute is at fault, but liability based on such fault is not strict liability.

Statutes which are interpreted as not recognizing excuse actually impose strict liability;⁶⁸ the defendant is held liable even though he could not have reasonably complied with the statute. Courts have normally used negligence per se terminology in imposing liability for violation of "pure food" statutes; however, because no excuses are recognized

60. RESTATEMENT, *supra* note 53, § 285, comment d; Morris, *supra* note 18, at 454.

61. RESTATEMENT, *supra* note 53, § 285, comment i.

62. Morris, *supra* note 18, at 455.

63. Gregory, *Breach of Criminal Licensing Statutes in Civil Litigation*, 36 CORNELL L.Q. 622, 625 (1951).

64. RESTATEMENT, *supra* note 53, § 286.

65. *Id.* § 288A.

66. Morris, *supra* note 18, at 458.

67. RESTATEMENT, *supra* note 53, § 288A.

68. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 197 (4th ed. 1971); RESTATEMENT, *supra* note 53, § 288A, comment c.

for violating such statutes,⁶⁹ it is generally recognized that strict liability is being imposed.⁷⁰

If section 402A of the *Restatement* were enacted into law as a criminal statute it would be analogous to the pure food statutes. A court could impose civil liability based on its violation and denominate the action negligence per se. However, this would constitute strict liability rather than liability based on fault. Wisconsin would recognize no excuse for failing to comply with the statute no matter how reasonable the defendant was in failing to comply.⁷¹ Thus, the defendant could be held strictly liable for violating this statute even though he was completely faultless in being unable to comply, a result that is not possible in true negligence per se situations.

Furthermore, the *Restatement* is inappropriate for negligence per se because it does not create a specific standard of conduct. In true negligence per se cases the defendant's fault in failing to comply with the statute is available for comparison with the plaintiff's fault in contributing to his own injury. This comparison is possible because negligence per se addresses itself to the specific standard of conduct. The jury compares the unreasonable failure of the defendant to take the precaution imposed by statute with the unreasonable failure of the plaintiff to take the precaution that the jury has determined he should have taken. Such a comparison is not possible under section 402A. This section does not really address itself to a specific standard of conduct, *i.e.*, specific methods manufacturers must use in order to achieve the objective of producing products free from defects. It merely condemns the end result of marketing a defective product. Because no finding of negligence is necessary, the jury could conclude that no reasonable precaution on behalf of the manufacturer would have prevented the creation of the defect. In this situation a comparison of the defendant's reasonable conduct with the specific personal culpability of the plaintiff would yield the conclusion that the plaintiff was at fault and the defendant was not. In such a case plaintiff's contributory negligence emerges as a complete defense.⁷²

The negligence per se rationale is clearly a fiction.⁷³ Even the Wisconsin court has recognized this.⁷⁴ Although legal fictions are sometimes

69. Authorities cited note 68 *supra*.

70. R. DICKERSON, *PRODUCTS LIABILITY AND THE FOOD CONSUMER*, § 1.24 (1951); W. PROSSER, *supra* note 68, § 36, at 197-98; *RESTATEMENT*, *supra* note 53, § 288A, comment c; Wade, *supra* note 55, at 9; Wade, *supra* note 6, at 835.

71. *Howes v. Deere & Co.*, 71 Wis. 2d 268, 238 N.W.2d 76 (1976) (adopting Judge Heffernan's opinion as representing view of majority of court); *Greiten v. La Dow*, 70 Wis. 2d 589, 599-604, 235 N.W.2d 677, 683-86 (1975) (Heffernan, J., concurring).

72. *Schuh v. Fox River Tractor Co.*, 63 Wis. 2d 728, 218 N.W.2d 279 (1974).

73. V. SCHWARTZ, *supra* note 2, § 12.1; Fleming, *supra* note 8, at 270.

74. *Howes v. Deere & Co.*, 71 Wis. 2d 268, 238 N.W.2d 76 (1976) (adopting Judge Heffernan's opinion as representing view of majority of court); *Greiten v.*

useful, this one is unnecessary and leads to highly undesirable consequences in certain cases.

B. *Fictitious Fault*

In our system of law fault means personal culpability, including negligence,⁷⁵ recklessness, and intentional misconduct. Conversely, strict liability means "liability without fault."⁷⁶

Because of the desirability of applying comparative negligence to strict liability, a number of judges⁷⁷ and writers⁷⁸ have urged that strict liability does involve "fault" that can be compared with the plaintiff's contributory negligence.⁷⁹ This is either the "social fault"⁸⁰ involved in marketing defective products or the "legal fault"⁸¹ arising from a breach of duty to market defect-free products.

This approach does not solve the underlying problem of the lack of a workable basis of comparison. The word "fault" can be redefined to include innocent conduct as well as culpable conduct, but this merely begs the question. "Social fault" in marketing defective products still has nothing in common with the type of specific personal culpability required for contributory negligence. The concepts cannot be compared rationally.⁸²

To illustrate, suppose the plaintiff purchases an axe with a physical imperfection in the handle. A reasonable person in his position would have discovered the defect and realized that this involved a serious danger, but plaintiff failed to observe the defect. In using the axe, the handle breaks and the head of the axe forcefully falls on the plaintiff's leg, seriously injuring him. The plaintiff brings suit against the wholesaler who purchased and resold the axe to a retailer without ever opening the carton.

La Dow, 70 Wis. 2d 589, 599-604, 235 N.W.2d 677, 683-86 (1975) (Heffernan, J., concurring).

75. BLACK'S LAW DICTIONARY 738 (Rev. 4th ed. 1968); Polelle, *The Foreseeability Concept and Strict Products Liability: The Odd Couple of Tort Law*, 8 RUT.-CAM. L.J. 101, 102 (1976).

76. BLACK'S LAW DICTIONARY 1591 (Rev. 4th ed. 1968).

77. *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976); *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 372, 551 P.2d 398, 405, 131 Cal. Rptr. 78, 85 (1976) (Clark, J., dissenting).

78. Brewster, *supra* note 1, at 118; Fleming, *supra* note 8, at 270.

79. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976) (one judge urged adoption of comparative causation rather than comparative fault); *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 372, 551 P.2d 398, 405, 131 Cal. Rptr. 78, 85 (1976) (Clark, J., dissenting); Brewster, *supra* note 1, at 118; Fleming, *supra* note 8, at 270.

80. Fleming, *supra* note 8, at 270.

81. *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976).

82. Payne, *supra* note 20, at 347.

The plaintiff's departure from the standard of reasonable conduct, however great or small it may be in this case, cannot be compared with the "social fault" of the wholesaler in marketing the defective axe. The reason for this becomes apparent when the nature of comparative negligence is examined. The process of comparison involved is to make a subjective judgment that the plaintiff's blameworthy conduct is either "*more or less* blameworthy than other blameworthy conduct (actual or hypothetical)."⁸³ Blameworthy conduct may be placed on a spectrum with simple inadvertence at the lower end of the spectrum and intentional infliction of harm at the opposite end; recklessness is somewhere between the two, and conscious disregard of a risk falls between inadvertence and recklessness.⁸⁴ In comparing the culpable conduct of two individuals, it is rational to determine where the conduct of each lies upon that spectrum and to determine that one was more culpable than the other. Thus, an intentional wrongdoer is more culpable than a negligent wrongdoer. Even if both wrongdoers are guilty of mere inadvertence, there can be a difference in culpability depending on the magnitude of the foreseeable risk, the utility of the plaintiff's conduct, etc. In the example, the plaintiff's culpability would be evaluated by considering the extent to which the harm was foreseeable, the magnitude of the harm threatened by use of a defective axe, the interest the plaintiff was protecting in not bothering to inspect the handle, etc. The reason that the plaintiff's inadvertence in the example cannot be compared with the social fault of the wholesaler is because his social fault does not lie anywhere on the spectrum of blameworthiness. The result of the comparison must be that the wholesaler's blameworthiness is zero. This attributes 100 percent of the fault to the plaintiff, regardless of how slight his negligence might be. He is completely barred from recovery.

It might be argued that social fault is just as relative as personal culpability. For example, because the underlying basis of strict liability is risk spreading, the manufacture may be in a better position to spread the risk than the wholesaler and thus guilty of more social fault. In addition, to the extent that deterrence underlies the imposition of strict liability, the manufacturer is guilty of more social fault than the retailer because deterrence applies only to him, the wholesaler having no control over the manufacturing process. However, even if there are relative degrees of social fault just as there are relative degrees of personal fault, the two still can not be compared because they lie on different scales. Telling the jury to compare personal culpability with social fault is like telling them to compare distance with temperature. The concepts are not comparable and no change in terminology can make them comparable.

Those advocating that comparative negligence be applied to strict liability cases often dismiss the absence of a basis for comparison as

83. Aiken, *supra* note 17, at 295 (emphasis in original).

84. *Wing v. Morse*, 300 A.2d 491, 500 (Me. 1973).

being a mere theoretical difficulty which will not keep the jury, as a practical matter, from reaching a just apportionment.⁸⁵ It is true that the jury can solve the apportionment problem without any practical difficulty whatsoever. There are dozens of methods of apportionment that human beings might employ.

A serious practical problem arising from implementation of this philosophy is that the court has no way of controlling which method of apportionment the jury is using in a given case. This problem will arise whenever the case is submitted to the jury with no guidelines at all, with guidelines that are so vague that they have no meaning, or with guidelines that cannot be logically applied. A judgment for the defendant might be based either on the plaintiff's fault or on the jury's dislike of strict liability. A judgment for the plaintiff could be based on a dislike of the defendant corporation or on the absence of contributory fault by the plaintiff.

Whether to impose liability on the defendant, and the extent of that liability, are important questions of social policy. The way in which comparative negligence is applied involves that question, *i.e.*, to what extent risk spreading should be sacrificed in order to deter the plaintiff and others like him. This is a question that should be rationally resolved and consistently applied in all cases. It is a highly improper to let the jury decide such policy questions on a completely *ad hoc* basis with no meaningful guidance from the court. Under such circumstances the tort system becomes a "thinly disguised lottery."⁸⁶ Such an apparatus is clearly an inadequate means of making the type of policy decisions involved.

C. Comparative Causation

Apparently recognizing the impossibility of comparing "social fault" with personal fault, a number of legal writers have advocated comparison of the causal contribution of the parties to the result.⁸⁷ At least two courts have purported to do this.⁸⁸ A concurring judge in another

85. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42 (Alaska 1976); *Horn v. General Motors Corp.*, 17 Cal. 3d 359, 372, 551 P.2d 398, 405, 131 Cal. Rptr. 78, 85 (1976) (Clark, J., dissenting); *McNichols*, *supra* note 11, at 401; *Noel*, *supra* note 3, at 118; *Schwartz*, *supra* note 11, at 181; *Twerski, The Use and Abuse of Comparative Negligence in Products Liability*, 10 IND. L. REV. 797, 806 (1977).

86. *Henderson, Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 468 (1976).

87. *Brewster*, *supra* note 1, at 118; *Jensvold, A Modern Approach to Loss Allocation Among Tortfeasors in Products Liability Cases*, 58 MINN. L. REV. 723, 725 (1974); *Comment, Tort Defenses to Strict Products Liability*, 20 SYRACUSE L. REV. 924, 945 (1969); *Note, Torts—Doctrine of Strict Liability Meets a Comparative Negligence Statute*, 17 DEPAUL L. REV. 614, 618 (1968).

88. *Sun Valley Airlines, Inc. v. Avco-Lycoming Corp.*, 411 F. Supp. 598 (D. Idaho 1976); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977).

opinion advocated that it be done rather than attempt to compare the fault of parties.⁸⁹

This presents two problems. First, in most situations it is no easier to compare the causal contribution of the parties than it is to compare negligence with strict liability. Second, there is no functional relationship between fault and causal contribution. In terms of achieving the objectives underlying strict liability and comparative negligence, the result is no better than a purely random method of apportionment.

It is virtually impossible to measure the causal potency or contribution of a given cause.⁹⁰ The concurrence of many causes is required to produce any given event,⁹¹ and each cause is equally necessary to produce the result in the sense that without the cause the event would not have occurred.⁹²

Furthermore, even assuming that the contribution of each cause can be measured, its significance would be considerably distorted under a system of comparative negligence. The contribution of a given cause is meaningful only if it is measured in relation to all other causes.⁹³ However, a system of comparative causation would attempt to measure only the relative contribution of the parties without regard to all the other causes.⁹⁴ The resulting ratio is not an accurate statement of the amount that each party contributed to the result, but is at most a comparison of two causes in isolation.⁹⁵

In other areas of the law, courts have seldom been successful in evaluating causal contribution. For example, when joint tortfeasors act independently to produce an indivisible harm, courts are willing to apportion damages if there is a reasonable basis for determining the contribution of each cause to the harm.⁹⁶ The courts have found few such bases. Water pollution can be apportioned according to how much pollutant each defendant added to the system,⁹⁷ and livestock killed by a pack of dogs can be apportioned according to how many dogs each of the defendants owned.⁹⁸ These analogies are of little use in most products liability cases.

As products liability cases normally involve accidents, one possible basis of apportioning causal contribution is to measure the physical force that each party contributed to the accident. Professor Schwartz illus-

89. *Butaud v. Suburban Marine & Sporting Goods, Inc.*, 555 P.2d 42, 47 (Alaska 1976) (Rabinowitz, J., concurring).

90. Aiken, *supra* note 17, at 296; Payne, *supra* note 20, at 353.

91. Aiken, *supra* note 17, at 296.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. RESTATEMENT, *supra* note 53, § 433A.

97. *Id.* comment d.

98. *Id.* comment d.

trated this approach with an example⁹⁹ similar to the following: an intoxicated motorcyclist traveling 65 miles an hour crosses the center line of the highway and runs into a truck going 65 miles per hour. Considering the weight, speed, and direction of each vehicle, it is scientifically determined that the truck contributed 95 percent of the force involved. If damages are apportioned on this basis, the motorcyclist's estate would receive 95 percent of his damages. This result is inconsistent with the objectives of comparative negligence. The motorcyclist was clearly more culpable than the truck driver, and if losses are to be distributed in accordance with fault, the result is wrong.¹⁰⁰

The reason comparative causation yields such an unsatisfactory result is because there is no functional relationship between physical causation and personal culpability. The result yielded by applying comparative causation is random. This is illustrated by reversing the facts in the example. If it had been the truck driver who was intoxicated and driving on the wrong side of the road, and assuming the evidence as to physical force is the same, the truck driver would receive 5 percent of his damages from the motorcyclist. If both individuals had been driving automobiles of equal size and weight the drunkard would receive 50 percent of his damages from the slightly negligent driver of the other car. In all three examples the fault of the drunken driver is the same. Yet whether he recovers 95 percent of his damages, 50 percent of his damages, or 5 percent of his damages, depends on the entirely fortuitous circumstance of the weight of his motor vehicle. It is obvious that a lottery which allocated damages on a purely random basis would be as satisfactory as physical causation.

Apportioning damages according to the amount of physical force attributable to each party would be especially unsatisfactory in cases where all the force is attributable to one party. For example, in many exploding soda bottle cases all the force would be attributable to the defendant. In cases where a splinter from a defective hammer injures the plaintiff's eye, all the physical force involved would be attributable to the plaintiff if he was using the hammer. The entire loss would be borne by the defendant in the former case and by the plaintiff in the latter case without regard to the relative degree of fault involved.

Causation has no relationship to the policy bases underlying the need to apportion damages. Therefore, any other basis for attributing causal contribution, such as directness versus indirectness, will have the same shortcomings as the use of physical force as the basis of apportionment. The policy of risk distribution is to spread the loss among all consumers rather than to let it lie with the plaintiff. However, to the extent that the loss is attributable to the plaintiff's fault, it need not be redistributed. It is fair to require the plaintiff to bear that portion of the

99. V. SCHWARTZ, *supra* note 2, § 17.1.

100. *Id.*

loss, and requiring him to do so provides an incentive for him to be careful. The most appropriate way to achieve the proper balance is to reduce the plaintiff's recovery in proportion to the extent of his own fault; that is, the more he is at fault, less of the loss will be redistributed. This approach also would maximize the deterrent effect of strict liability. The sanction imposed on the plaintiff increases with his culpability. That portion not borne by the plaintiff is shifted to the defendant. This loss, or potential loss, provides an incentive for the manufacturer to improve the safety of his products.

If causal contribution were relevant, then it would be reasonable to consider the plaintiff's non-negligent contribution in apportioning the harm. That is, if there is social fault in marketing the product, why is there not also social fault in buying or using the product; no harm can result from defective products unless they are used. Thus, even in cases in which neither the plaintiff nor the defendant is negligent, damages might be apportioned according to the causal contribution of each to the result. No one would consider doing this because, to the extent that the loss is not shifted to the defendant, risk spreading and deterrence are defeated with no offsetting benefit. Improved risk distribution can be achieved only if the amount of loss the plaintiff is required to bear is rationally related to the extent of his fault. Any test of causal contribution (physical force, directness/indirectness, etc.) provides an essentially arbitrary basis for apportionment because it has no relationship to culpability.

D. Application of Comparative Negligence Statutes

Many of the problems arising in this area have resulted from the attempt to apply comparative negligence statutes to strict liability cases. Most such statutes are expressly limited to tort actions based on negligence and require a comparison of the negligence of the plaintiff and defendant. Such statutes cannot be applied in workable fashion to strict liability cases.

*Hagenbuch v. Snap-On Tools Corp.*¹⁰¹ clearly illustrates the problem. The plaintiff's eye was injured when a hammer he was using chipped due to decarbonization. He was contributorily negligent in using the hammer because he knew that it had chipped before. He sued the defendant who had marketed the hammer under his own brand name and the actual manufacturer of the hammer on theories of strict liability and negligence. In a judge-tried case, the federal district court found that the manufacturer of the hammer was not negligent, but that the defendant who marketed the hammer was negligent in not exercising his superior knowledge to require the manufacturer to use procedures that would reduce the hazard of decarbonization. The court also found that

101. 339 F. Supp. 676 (D.N.H. 1972).

both defendants were subject to strict liability because the hammer was defective. The court predicted that New Hampshire would apply its comparative negligence statute to strict liability actions. It found that the causal negligence attributable to the plaintiff was 20 percent and entered a judgment against both defendants for 80 percent of the damages on the strict liability theory. The judge gave no indication as to how he arrived at these percentages.

One problem with the decision is that the judge did not indicate how it was possible to enter a judgment against the defendant manufacturer who was found to be non-negligent. New Hampshire has a modified comparative negligence statute which precludes any recovery if the plaintiff's negligence is greater than the defendant's negligence.¹⁰² Because the defendant manufacturer was not negligent at all, the plaintiff's negligence, no matter how slight, must have been greater. Thus, if the statute applied, no recovery could be had against that defendant under either a strict liability theory or a negligence theory.¹⁰³

A second problem is whether the New Hampshire comparative negligence statute even can be applied to a strict liability action. It was argued that the statute did not apply to strict liability because it did not specifically refer to that type of action. The court countered this argument by saying that the statute could not have referred to strict liability because section 402A was judicially adopted *after* the enactment of the comparative negligence statute. This reasoning is questionable because strict liability (based on a breach of warranty theory) was imposed in New Hampshire *before* adoption of its comparative negligence statute. Therefore, a stronger argument might be that the comparative negligence statute was not intended to apply to strict liability.

If a modified comparative negligence statute is literally applied to strict liability cases, highly undesirable results will occur. In cases in which there is no evidence of the defendant's negligence, or in which the defendant is less negligent than the plaintiff, simple contributory negligence emerges as a complete bar to recovery.

The only way to reach a desirable result is to reinterpret the statute to say something that it does not say. Thus, as one court which applied its comparative negligence statute to strict liability has said:¹⁰⁴ "The comparative negligence statute becomes more than a comparative *negligence* or even comparative *fault* statute; it becomes a comparative *cause* statute under which all independent and concurrent causes of an accident may be apportioned on a percentage basis." This "creative legal fiction"¹⁰⁵ is advocated as being necessary to achieve improved loss allo-

102. Orcutt & Ross, *Comparative Negligence in New Hampshire*, 12 N.H.B.J. 6 (1969).

103. *Id.* at 9.

104. *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 394 (Minn. 1977), *quoting* Jensvold, *supra* note 87, at 725.

105. Jensvold, *supra* note 87, at 749.

cation. Such reinterpretation of unmistakably clear legislative language is simply unacceptable if the rule of law is to prevail in our system. Courts are simply not free to ignore clear statutory language of this nature.

It is not necessary to apply comparative negligence statutes to strict liability cases in order to reduce the plaintiff's recovery in proportion to his fault. Where such statutes are concerned only with negligence liability, they have no effect one way or the other on strict liability actions. Common law courts have as much power to determine what shall constitute a defense to common law strict liability as they did prior to the passage of the comparative negligence statutes.¹⁰⁶ Thus, courts are free to reject the rule that simple contributory negligence is no defense and adopt the rule that it is a partial defense notwithstanding the existence of a comparative negligence statute.¹⁰⁷

IV. DAMAGE APPORTIONMENT IN ACCORDANCE WITH THE QUANTUM OF THE PLAINTIFF'S FAULT

The most satisfactory method to apportion damages in true strict liability cases is to reduce the plaintiff's recovery in proportion to the extent of his own fault. This will achieve the most equitable risk distribution in view of the policy underlying strict liability. Losses will be redistributed except to the extent that the plaintiff was at fault; the greater the fault, the less loss that will be redistributed. This is consistent with the policy of deterrence because such apportionment will encourage plaintiffs to act reasonably. That portion of the loss which is shifted to the manufacturer provides an incentive for him to make his products more safe. The approach is also consistent with the policy of risk spreading. To the extent that the plaintiff is innocent, all risks are spread among all consumers. Losses will lie with a given plaintiff only to the extent that he has been at fault, and there is no compelling reason to shift this portion of the loss to society as a whole.

The method of apportioning damages in accordance with the plaintiff's fault is to compare the plaintiff's conduct with how he should have conducted himself (the objective standard of the reasonable man) and reduce his recovery according to the extent of his fault.¹⁰⁸ The determination made by the jury is the same as under comparative negligence, except that the comparison is made between one unreasonable person (the plaintiff) and one hypothetical reasonable person, rather than between two unreasonable people (the plaintiff and the defendant). A plaintiff who is guilty of mere inadvertence is only moderately at fault and should have his damages reduced to a moderate extent. A plaintiff who knowingly encounters a serious risk for no good reason is greatly at fault and should have his damages reduced to a very great extent. Pre-

106. Schwartz, *supra* note 11, at 180.

107. General Motors Corp. v. Hopkins, 548 S.W.2d 344 (Tex. 1977).

108. Payne, *supra* note 20, at 347.

cise mathematical determination of the percentage of reduction appropriate in each case is of course impossible,¹⁰⁹ but this is also impossible under comparative negligence. A rough apportionment can be made, and the result is clearly superior to the alternative of either barring the plaintiff completely or permitting him to recover his full damages.

V. CONCLUSION

Whether comparative negligence should be applied in strict liability actions is a question of policy. The advantage this approach offers is that it simultaneously advances the risk spreading and safety incentive policies of strict liability and the deterrence policy of comparative negligence. The disadvantage is that the policies underlying strict liability are not as fully advanced when comparative negligence is applied as they otherwise would be. Each jurisdiction must decide which scheme is most appropriate.

Once the decision to apply comparative negligence to strict liability has been made, it is imperative that the scheme of comparative negligence employed be adapted to the special problems of strict liability. Otherwise the objectives underlying the decision may be partially or wholly thwarted. Application of existing comparative negligence statutes to strict liability cases can result in the reintroduction of simple contributory negligence as a complete defense in many instances, even when the negligence of the plaintiff is very slight. This occurs when the defendant has not been negligent at all or when the defendant's negligence is less than the plaintiff's negligence in a modified comparative negligence jurisdiction. Adoption of comparative causation is equally unsatisfactory because of the impossibility of measuring the causal contribution of each party and because, in any event, causal contribution is irrelevant to determining the degree of each party's culpability. Adoption of the "fictitious fault" approach is perhaps the most unsatisfactory scheme of all. In practice this results in submission of the case to the jury with no meaningful guidance whatsoever. Consequently, cases are decided at the whim of individual juries. The policies underlying the adoption of comparative negligence are not likely to be advanced in a consistent fashion.

The most satisfactory way to implement the decision to apply comparative negligence to strict liability cases is to instruct the jury to reduce the plaintiff's recovery in accordance with the extent of the plaintiff's fault when his conduct is compared to the conduct of the hypothetical reasonable person. The court thus fulfills its function of giving meaningful guidance to the jury. Important policy decisions are made as a matter of law. The jury simply performs its traditional role of determining fact questions. Rational and consistent disposition of all cases would result from the implementation of this proposal.

109. Aiken, *supra* note 17, at 295.